1990

Thomas R. Humphries v. State of Utah : Petition for Writ of Certiorari

Utah Supreme Court

BRIEF

.S9
DOCKET NO. 90 0006

IN THE SUPREME COURT STATE OF UTAH

THOMAS R. HUMPHRIES,	:	
PETITIONER,	:	WRIT OF CERTIORARI
V.	:	COURT OF APPEALS
STATE OF UTAH,	:	CASE NO. 880704-CA
RESPONDENT.	:	CERTIORARI DOCKET NO.
	:	# 900006

APPELLANT, THOMAS R. HUMPHRIES, PETITIONS THIS COURT FOR A WRIT OF CERTIORARI.

APPELLANT, THOMAS R. HUMPHRIES, PETITIONS FOR WRIT OF CERTIORARI OF THE OPINION OF THE UTAH COURT OF APPEALS FILED ON NOVEMBER THE 15th, 1989, IN CASE NO. 880704CA.

THOMAS R. HUMPHRIES
1141 SOUTH 2250 WEST
SALT LAKE CITY, UTAH 84014
IN PROPIA PERSONA

R. PAUL VAN DAM
UTAH ATTORNEY GENERAL
DAN LARSEN
ASSISTANT ATTORNEY GENERAL
236 STATE CAPITOL
SALT LAKE CITY, UTAH 84114
TELEPHONE (801) 533-6000
ATTORNEYS FOR RESPONDENT

IN THE SUPREME COURT STATE OF UTAH

THOMAS R. HUMPHRIES,	:	
PETITIONER,	:	WRIT OF CERTIORARI
V.	:	COURT OF APPEALS
STATE OF UTAH,	:	CASE NO. 880704-CA
RESPONDENT.	:	CERTIORARI DOCKET NO.
	:	#_____

APPELLANT, THOMAS R. HUMPHRIES, PETITIONS THIS COURT FOR A WRIT OF CERTIORARI.

APPELLANT, THOMAS R. HUMPHRIES, PETITIONS FOR WRIT OF CERTIORARI OF THE OPINION OF THE UTAH COURT OF APPEALS FILED ON NOVEMBER THE 15th, 1989, IN CASE NO. 880704-CA.

THOMAS R. HUMPHRIES
1141 SOUTH 2250 WEST
SALT LAKE CITY, UTAH 84014
IN PROPIA PERSONA

R. PAUL VAN DAM
UTAH ATTORNEY GENERAL
DAN LARSEN
ASSISTANT ATTORNEY GENERAL
236 STATE CAPITOL
SALT LAKE CITY, UTAH 84114
TELEPHONE (801) 533-6000
ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF ISSUES PRESENTED FOR REVIEW

(1) Whether the Utah Court of Appeals erred in denying Appellant's pro-se motion to re-appoint counsel on appeal.

(2) Was Appellant denied his right to effective assistance of counsel on his direct appeal before the Utah Court of Appeals?

OPINION OF THE UTAH COURT OF APPEALS

In Re: State V. Humphries, case no. 880704-CA, the Court of Appeals affirmed Defendant's conviction of Issuing Bad Checks, a felony in the third degree, in violation of Utah Code Ann. 76-6-505 (1) (Supp. 1988), citing that the issues presented for review were not properly preserved before the trial court.

STATEMENT OF GROUNDS FOR JURISDICTION

This Petition for Writ of Certiorari is properly before this Court pursuant to Utah Code Ann. 78-2-2 (5), and Rules 42 and 43 of the Rules of the Utah Supreme Court. Motion for enlargement of time in which to file said Writ of Certiorari was filed and granted on December 14th 1989.

STATEMENT OF THE FACTS

Defendant, Thomas R. Humphries, was convicted November 4th, 1988, in a trial by jury of the charge Issuing Bad Checks in violation of Utah Code Ann. 76-6-505 (1). Defendant subsequently appealed, the Utah Court of Appeals affirmed the conviction in an unpublished Memorandum Decision filed November 15th, 1989. Prior to appointed counsel's filing of a Docketing Statement, Defendant filed with the trial court a pro-se motion to re-appoint counsel

on appeal, on January 19th, 1989, said motion was denied on January 31st, 1989. (attached hereto as Adendum "A") After appointed counsel filed his brief in the Utah Court of appeals the Defendant filed with the reviewing court a motion to re-appoint counsel as counsel refused to address meritoriously arguable issues as requested. The Utah Court of Appeals denied said motion in an order dated July 20th, 1989 (attached hereto as Addendum"B").

To fully address the issues presented for review it is necessary to begin at the initial conflict occurring in the case at bar. For benefit of this Court it should be noted that all three Davis County Public Defenders are also at the same time Prosecuting City Attorneys for various cities within Davis County (sent. T. 10).

At the time set for Preliminary Hearing the trial court appointed Attorney Glenn T. Cella a Davis County Public Defender, to represent the Defendant. The Defendant at that time raised an issue of conflict being that Attorney Cella was also Prosecuting Attorney for the City of Kaysville, the City that had filed and investigated the charges against the Defendant. Counsel stated to the Court that he felt there was indeed a conflict and didn't feel it was appropiate for him to proceed in the case at bar (prelim. T.3-6). Attorney Cella at that time attempted to to turn his conflict to Davis County Public Defender Attorney Steve Vanderlinden who was at the same time Prosecuting Attorney for the City of

Clearfield, Attorney Vanderlinden refused to accept the appointment citing two reasons for his refusal; (1) that he didn't feel Attorney Cella's conflict was legitimate under the scope of the contract with Davis County; and two (2) that he shouldn't have to accept the additional burden that the caseload would present (T.3-6 12/20/88) (T. 5 1/3/89). Attorney Cella then retained Attorney Cathcart to represent the Defendant at trial . The Defendant strenously objected to the finacial arrangements existing between counsel's at the time of trial (trial T. 4-5). At the time set for sentencing counsel for the Defendant filed with the trial court the following motions; (1) Notice of Appeal; (2) Motion for Certificate of Probable Cause; (3) Withdrawal of Counsel. The trial court questioned counsel as to why he was appointed as opposed to Attorney Vanderlinden. Counsel responded that Attorney Vanderlinden had a conflict of interest with the Defendant (sent. T. 10).

The trial court then appointed Attorney Vanderlinden as appellate counsel. At the hearing held December 20th, 1989, Attorney Vanderlinden failed to appear before the court, instead he asked Attorney Cella to enter an appearance before the court to explain his refusal to accept said appointment on appeal, subsequently the trial court ordered Attorney Vanderlinden to accept said appointment (T.3-6 12/20/88). The trial court then continued the hearing ordering Attorney Vanderlinden to present himself before the court. At the time of the hearing the Defendant objected to Attorney Vanderlinden's representation without him having first review the trial transcripts (T.5 1/3/89). The trial court again continued the hearing determining that it would be advantageous for counsel to first

review the trial transcripts prior to arguments being heard(T.9 1/3/89). The Defendant subsequently filed a pro-se motion to dismiss and re-appoint appellate counsel and raised two issues one (1) that counsel having previously stated that in his opinion the conflict occurring was not a true conflict, he would be unable to effectively represent the Defendant on that issue on appeal;(2) that counsel was unprepared because of his excessive caseload and refused to raisemeritourisly arguable issues on appeal (T.4-9 1/31/89). (T. 4 3/14/89) (T. 19-20 3/28/89).

The Defendant repeatedly requested counsel to raise on appeal the following issues; (1) the conflict occurring at trial due to the contractual arrangement between Attorney's Cella and Cathcart; (2) ineffective assistance of trial counsel for his failure to raise an objection to the numerous errors occurring throughout the trial; (3) the issue of "plain error" as defined by Rule 103 (2) (d), Utah Rules of Evidence; (4) the cumulative affect of the errors: (5) the convictions used against the Defendant in sentencing that were erroneous, that were properly objected to at the time of sentencing, these issues were addressed in letters to both counsel and the Court of Appeals and is additionaly supported by the trial court record.

Attorney Vanderlinden having filed a brief on behalf of the Appellant without addressing the meritourisly arguable issues related above, the Defendant at that time again requested that the court dismiss and re-appoint counsel on appeal, said motion was denied in a Utah court of Appeals order dated July 20th, 1989. The Defendant's conviction having been affirmed, he would now request

that this Court grant his Writ for Certiorari, to review the issues of conflict of counsel and ineffective assistance of appellate counsel. The Petitioner would contend that the representation he recieved on appeal were in violation of Article One Section Twelve of the Utah Constitution and the Sixth and Fourteenth Amendments to the United States Constitution.

ARGUMENT

ISSUE NUMBER ONE!

Whether the Utah Court of Appeal and the trial court erred in denying Appellant's pro-se motion to re-appoint counsel on appeal.

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to have the compulsary process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

This language has been read to include the right of indigents to appointed counsel in felony prosecutions, Gideon V. Wainwright, 372 U.S. 355, 83 S. Ct. 792, 9 L.Ed 2d 799 (1963), the right to self-representation, Faretta V. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1974) and the right to effective assistance of counsel, McMann V. Richardson, 397 U.S. 759, 771 n. 14, 90 S. Ct. 1441, 1449 n.14, L.Ed. 2d 763 (1970); Birt V. Montgomery, 725 F.2d 587, 592 (11th Cir. 1984) (en banc) (Sixth Amendment right

to counsel has four components; right to have counsel, minimum quality of counsel, a reasonable opportunity to select and be represented by chosen counsel and the right to preparation period sufficient to assure minimum quality counsel); Gandy V. Alabama, 569 F. 2d 1318, 1323 (5th Cir. 1978). The United States Supreme Court in Faretta, supra, stated as follows:

> "The language and spirit of the Sixth Amendment contemplates that counsel, like other defense tools guaranteed by the amendment, shall be an aid to a willing defendant.*** To thrust counsel upon the accused, against his considered whish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of personal character upon which the Amendment insists.*** An unwanted counsel 'represents' the defendant only through a teneous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense.***
>
> But it is one thing to hold that every defendant, rich or poor, has the right to the assistance of counsel, and quite another to say that a State may compel a defendant to accept a lawyer he does not want. The value of the state-appointed counsel was not unappreciated by the Founders, yet the notion of compulsory counsel was utterly foreign to them. And whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice."

Thus, a defendant in a criminal trial, or in the case at bar on appeal , does not have an absolute right to counsel of his choice when indigent, but, when the defendant has made a showing that irreconcilable differences have created a conflict, that conflict should be fully explored by the trial court. Both the trial court and the reviewing court made a determination that they could see no violations of Constitutional rights suffered by the defendant, however controlling case law on the issue [illegible] shown and should be presumed

by the court, when such an issue is raised. In the case of Wheat V. United States, 486 U.S. 153, 108 S. Ct. 1692, 100 L.Ed. 2d 140 (1988), the Court found that counsel should be replaced when "even the appearance of impropriety exists."

The duty rests with the trial court to examine thoroughly the attorney-client relationship and to examine it as a very serious duty. In White V. White, 602 F. Supp. 173 (Mo. wd 1984), the defendant requested several times that his court-appointed counsel be replaced. The basis of his complaint was that counsel working with an overburdened caseload and had, therefore, failed to exercise the customary skill and dilligence that a competent attorney would have shown under similiar circumstances. The Court was of the opinion that when an accused is forced to stand trial with the assistance of appointed counsel with whom he has become embroiled in conflict, the accused is denied his right to effective assistance of counsel. The Court stated in that case as follows:

> "The trial court, when confronted by such an allegation, has an obligation to inquire thoroughly into the factual basis of the defendant's dissatisfaction. If an attorney and a client have an irreconcilable conflict, essential attributes of a healthy attorney-client relationship are non-existent. ***
>
> ... a careful examinatoin into the nature of the disagreement, its duration and the impact it would have on the conduct of the defense should have been conducted..... Had the reasons for the conflict been fully explored, the air might have been cleared. On the other hand, the completeness of the rift between the two might have been established.... Under the circumstances, petitioner need not show that he was actually prejudiced by the irreconcilable conflict with his counsel. Prejudice should be presumed from a fractured attorney-client relationship just as it would be if the petitioner had been denied the assistance of counsel."

In the instant case Attorney Vanderlinden had been appointed by the trial court on appeal and for the purposes of post-trial motions before the court, at the hearing on December 20th, 1988, Attorney Vandelinden refusing to represent the defendant, requested that Attorney Cella stand in and explain the situation to the trial court, Attorney Cella addressed the court as follows:

Mr. Cella: Judge we've had a discussion between Mr. Oda, Mr. Humphries and myself regarding the problems arising to the public defenders system or to our public defenders contract out of Mr. Humphries appeal. We've explained the problem to Mr. Humphries, and he has certain constitutional rights that he's not willing to waive, and we aren't asking him to waive any of those rights.

However, I had a conflict in this originally in the case. It was investigated by a Kaysville City police officer. Under the public defender system contract, my conflicts of interest are supposed to be assigned to Mr. Vanderlinden. Mr. Vanderlinden felt that the conflict generated by my prosecution for Kaysville City was not a true conflict under the scope of the public defender contract, and he declined to accept the --accept the case through the public defender system.

..... Mr. Cella: Stephan and I spent a few minutes talking with Judge Page about the probability of trying to get some idea of where the court wanted us to go on this matter. And Judge Page requested and said that in situations such as that and in the event that Mr. Vanderlinden declined to accept my conflict of interest, that that posistion should be made known to the Court."

... So in any event, as I was explaining, Judge Page said in additional situations such as that, I should merely inform the Court and order the Court to order Mr. Vanderlinden to take the case. And Judge Page said that would be how to handle the matter." (T. 3-5 12/20/88)

Further, four members of the bar attempted to explain to the trial court Attorney Vanderlinden felt that a conflict existed between himself and his client, (1) Attorney Cathcart, at sentencing (T. 10); (2) Attorney's Cella and Oda, as related above; (3) District Attorney Brian Namba (T. 5 1/03/89), the

trial court repeatedly refuse to accept Attorney Vanderlinden's posistion on the conflict, rather the court deciding to exert it's influence over Attorney Vanderlinden to accept the case;

"The Court; When did you talk to Mr. Vanderlinden last on this? I talked to him a week ago, and he was going to do this personally.

Mr. Cella: That's total news to me.

The Court: I talked with him right after we were in court two weeks ago. I worked with him for three or four days. And by Friday, a week ago, last Friday, he said I'll take the case." (T. 5 12/20/88)

Who better than counsel, should determine whether a serious conflict exists between himself and his client and then for the trial court to exert improper influence over Attorney Vanderlinden to accept a case he did not want, was indeed an error in judicial discretion.

The Petitioner would respectfully requset that this Court grant it's Writ of Certiorari to review the above related circumstances for abuse of discretion in violation of the Defendant's right to the assistance of counsel.

ISSUE NUMBER TWO!

Was Appellant denied his right to effective assistance of counsel on his direct appeal before the Utah Court of Appeals?

When newly appointed counsel attempted to argue a Motion for Certificate of Probable Cause, without first a review of the trial transcripts (T. 5-6 1/03/89), had never heard of the "plain Error" doctrine, told the defendant that the issue of the trial court [illegible] during sentencing was not

properly addressed on appeal, but, at matter for post-conviction relief, the defendant knew he was in trouble and subsequently petitioned the trial court for appointment of new counsel on appeal (T.4 1/31/89). The trial court denied the motion and subsequently Attorney Vanderlinden filed a brief on the defendant's behalf in the case at bar. When the Defendant learned that the brief did not contain the meritoriously arguable issues as requested by the defendant, he then petitioned the Court of Appeals to appoint new counsel on appeal which was denied.

In the case of Strickland V. Washington, 80 L.Ed 2d 674 (1984), the U.S. Supreme Court enuniated the general rules relating to the Sixth Amendment right to counsel as follows:

> "This Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial.
>
> That a person who happens to be a lawyer is present at trial along side the accused, however, it is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results.
>
> For that reason, the Court has recognized that "the right to counsel is the right to effective assistance of counsel." Strickland at 691 and 692.

This Court in the case of State V. McNicol, 554 P. 2d 203 204 (Utah 1976), stated that:

> "the right of the accused to have counsel is not satisfied by a sham or pretense of an appearance in the record by an attorney who manifests no real concern about the interests of the accused. he is entitled to the assistance of a competent member of the bar, who shows

> a willingness to identify himself with the interests of the accused and present such defenses as are available under the law and consistent with the ethics of the proffession."

In the present case the petitioner requested repeadedly that counsel raise and argue certain issues on appeal as related below from post-sentencing transcripts as follows:

Mr. Humphries: As the Court's well aware, on several occasions I brought the issue of conflict of counsel. I won't get into that today, your Honor. I would ask that considering the conflict that the Court would reserve me or allow me to argue after Attorney Vanderlinden is through if I feel that is necessary.

The Court: I don't care. If you want to argue your case, it's all right with me.

Mr. Humphries: Your Honor not necessarily argue but at least put it on the record to reserve the issues for appeal.

.... I just want the Court to be aware of the fact that right now I do not recognize Attorney Vanderlinden as counsel even though the court has allowed him to argue this certificate of probable cause. I don't feel that Attorney Vanderlinden can effectively represent my interest in this case.

The Court: It seems like you have a hard time deciding if he is going to represent you or not.

Mr. Humphries: No,sir. The Court has ordered me to proceed with Attorney Vanderlinden.

The Court: No, I haven't.

Mr. Humphries: So much. Or procees pro-se.

The Court: That's correct. I have said I'm not appointing you another attorney.

Mr. Humphries: I told the Court, your Honor, that I'm not capable of representing myself. I have no choice but to go along

.th him to some certain extent to try and help my defense, to
'y and make it valid at least a little bit.

.e Court: Are you through? " (T. 5-6 3/14/89)

'. Humphries: Your Honor, if I may please. I asked counsel
) bring up these issues before. He didn't think it was proper
; the time, but I think he has second thoughts after Attorney
ımba's arguments.

Attorney Namba brought up the issue of prosecutorial misconduct.
ıd we would ask the Court that it would consider the misconduct,
ıe statements of dishonesty throughout his closing arguement when
.ewied as a whole whether they would be considered plain error and
) go further into the ineffectiveness of counsel during the trial,
)r counsel not to object to all these different things through the
'ial: the voir dire, Attorney Namba's repeated references to
' dishonesty, instructions to the jury, even the association
ıether the jury foreman recognized a witness. And Attorney Cathcart
ıiled to object, and the Court did not delve in a little bit
ırther into that relationship. So when viewed as a whole, would
;torney Cathcart's representation be considered ineffectivene
;sistance of counsel?"

Several times both on the record and by letters, which were
:ver answered by counsel (T. 8 3/14/89), the defendant asked
ıat these issues be raised on appeal. In the case of Barnes V Jones,
,A. N.Y. 1981, 665 F2d 427 the Court addressed the issue of
)pointed counsels failure to raise issues as requested as follows:

> "...where a defendants appointed counsel intends to argue particular colorable points, but defendant requests that he raise additional colorable points, counsel must argue the additional points to the full extent of his proffessiona ability, and appointed counsels judgement that defendant is unlikely to prevail on the merits of his non frivilous arguements is no substitute for an active advocates presentation of those arguments to the appellate court."

In the case at bar the defendant made every effort to explain
to both the trial court and the Court of appeals, that counsel
vas refusing to raise issues as requested. In addressing the trial
:ourt the on the issue the defendant stated:

The Court: I assume what your probably saying in the matter, Mr. Humphries, is that you want to be listed as co-counsel?

Mr. Humphries: Your Honor, no, I don't think that I'm even capable of co-counsel. I just want to--I just want to be able to assert my rights before the Court. That is all, your Honor. The Court has made a decision that Attorney Vanderlinden is going to represent me in this matter. I have brought the issue to the Court.

The Court: You made the decision.

Mr. Humphries: The issues I feel are pertinent to this are on the record, and I hope they're on the record for the purposes of appeal I filed with the Utah Court of Appeals. So, therefore, to protect my interests, I think I've done all I can. I leave the rest up to the Court, your Honor. " (T. 10-3/14/89)

Further, the petitioner has identified omissions by counsel that "fall outside the wide range of proffessinally competent assistance." State V. Frame, 723 P.2d 401, 405 (Utah 1986). In the case of Estes V. texas, 381 U.s. 532, 543 (1965) citing in part Offutt V. United States, 348 U.S. 11, 14 (1955), the Supreme Court stated:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness..... To perform its high function in the best way "justice must satisfy the appearance of Justice."

Conclusion

The petitioner would request that theCourt grant it's Writ of Certiorari to review the above entitled case for violations of defendant's rights a guaranteed by the United States Constitution

and the Constitution of the State of Utah. It is the Petitioners contention that the Sixth and Fourteenth Amendments to the United States Constitution combine to assure each and every defendant is afforded the oppourtunity to have a fair and impartial trial and a fair and impartial review on appeal.

Respectfully submitted this 16th day of January 1990

Thomas R Humphries

THOMAS R. HUMPHRIES

IN PROPIA PERSONA

ADDENDUM "A"

ЭМАS R. HUMPHRIES
O. BOX 250
APER UTAH 84020

PROPIA PERSONA

IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR DAVIS COUNTY

STATE OF UTAH

ATE OF UTAH	Case No.Cr6119
PLAINTIFF	Motion to dismiss counsel
OMAS R. HUMPHRIES	and for appointment of
DEFENDANT	new counsel on Appeal

TO THE CLERK OF THE COURT, comes now the Defendant Thomas R. mphries and hereby moves the court for an order appointing new counsel ı appeal of the case at bar. The Defendant would also petition the court) dismiss previously appointed counsel. As shown by the affidavit of ıdigency peviously filed with the ı court for the request of counsel he is ıable to pay costs of obtaining said counsel.

Dated this 10th day of January 1989

Thomas R. Humphries

IN PROPIA PERSONA

hereby certify that I delivered
true and correct copy of the
oregoing motion on the following
y deposit with the U.S. mail.

Davis County District Attorney

Thomas R. Humphries

HOMAS R. HUMPHRIES
.O. BOX 250
RAPER UTAH 84020

N PROPIA PERSONA

IN THE SECOND JUDICAL DISTRICT COURT IN AND FOR DAVIS COUNTY

STATE OF UTAH

TATE OF UTAH PLAINTIFF VS HOMAS R. HUMPHRIES DEFENDANT	CASE NO. CR6119 motion for purchase of transcripts at the states expense

TO THE CLERK OF THE COURT, the Defendant moves the court for
n order directing the state to pay the cost of preperation and filing of the
ranscripts of the folling hearings of record, Arraingment, Pre trial , Trial
nd sentencing , and any other record that would properly enable the Defendant
o present his case on appeal.

Dated this 10th day of January 1989

Thomas R Humphries
Thomas R. Humphries

IN PROPIA PERSONA

hereby certify that I have served
true and correct copy of the foregoing
on the following individual, by deposit
th the U.S. Mail.

vis County District Attorney

Thomas R Humphries 1-10-89
omas R. Humphries

ADDENDUM "B"

IN THE UTAH COURT OF APPEALS

----ooOoo----

State of Utah, Plaintiff and Respondent,	)	ORDER
v.	)	Case No. 880704-CA
Thomas R. Humphries, Defendant and Appellant.	)	

This matter is before the Court upon appellant's Motion To Appoint New Counsel On Pendency Of Appeal, filed 26 June 1989.

Appellant is currently represented by counsel who was appointed by the Second Judicial District Court. Counsel entered an appearance herein on 3 February 1989 and, to date, has filed a docketing statement and brief on behalf of appellant. Counsel has responded timely to inquiries made by the Court with respect to this appeal.

Appellant shows no substantial conflict of interest with his attorney. As appellant was appointed competent counsel, IT IS HEREBY ORDERED that appellant's motion is denied. If appellant prefers new counsel, appellant is not precluded from hiring counsel of his choice.

Dated this 20th day of July 1989.

BY THE COURT:

Judge Norman H. Jackson

Utah Court of Appeals

400 Midtown Plaza
230 South 500 East
Salt Lake City, Utah 84102
801-533-6800

Mary T. Noonan
Clerk of the Court

June 19, 1989

Thomas R. Humphries
P.O. Box 250
Draper, UT 84020

In Re:

State of Utah,
Plaintiff and Respondent,
v. No. 880704-CA
Thomas R. Humphries,
Defendant and Appellant.

Dear Mr. Humphries:

The Court received your letter June 15, 1989 in the above appeal in which you contend that you have been ineffectively represented throughout your case. Your letter will be docketed as having been received. However, absent a motion to this Court, no action may be taken.

Sincerely,

Janice Hill
Deputy Clerk

cc: Steven C. Vanderlinden
R. Paul Van Dam
Deputy Davis County Attorney

ADDENDUM"C"

IN THE UTAH COURT OF APPEALS

----ooOoo----

State of Utah, Plaintiff and Respondent,	)	MEMORANDUM DECISION (Not For Publication)
v.	)	Case No. 880704-CA
Thomas R. Humphries, Defendant and Appellant.	)	

Before Judges Orme, Garff and Davidson.

PER CURIAM:

This is an appeal from a conviction for Issuing Bad Checks, a third degree felony, in violation of Utah Code Ann. § 76-6-505(1) (Supp. 1988). We affirm the conviction.

On May 5, 1988, defendant Thomas R. Humphries opened a checking account at the Washington Drive-up Branch of First Security Bank in Ogden, Utah. Defendant deposited $100 into the account, which was the only deposit he ever made. The bad check charge was based on the following six checks that were not honored by the bank:

DATE WRITTEN	PAYEE	AMOUNT
May 26, 1988	Bowman's Market	$ 90.00
May 27, 1988	Bowman's Market	$ 90.00
May 30, 1988	K-Mart	$273.36
May 30, 1988	Bowman's Market	$ 70.00
June 5, 1988	Ernst	$ 93.19
June 5, 1988	Ernst	$ 70.93

At trial, the State introduced into evidence fifteen additional checks that had been returned for insufficient funds. Each of those checks was dated prior to the six checks described above.

Humphries testified that he did not knowingly issue the bad checks. He explained that sometime between May 5 and 15, 1988, he had given a friend, Dorie Stewart, a deposit slip and

$3,600 in cash to be deposited in his checking account. He claimed that Stewart did not deposit the cash, but applied it to a debt owing to her by defendant. Defendant testified that the money was a settlement from a fire insurance claim which was split between him and two business partners. He testified that he did not report the money taken by Stewart to the police because he owed her money.

Defendant called Dorie Stewart as a witness. Prior to her testimony, counsel for the State examined her on voir dire. Outside the presence of the jury, counsel advised Stewart of her rights under the Fifth Amendment against self-incrimination and of the penalties for theft and perjury. Stewart then declined to testify based on the Fifth Amendment.

In closing argument, the State told the jury that Stewart "didn't want to lie, but she also didn't want to tell the hard truth and that is, that this man is dishonest". The prosecutor also stated in closing that defendant is a "dishonest person" and to "disregard the testimony of the defendant because of his dishonesty."

On appeal, defendant raises five claims of error. First, he claims it was prejudicial error for the prosecution to state to the jury, in closing argument, his opinion that defendant was a dishonest person. Second, he contends that the prosecution improperly threatened a witness if she testified. Third, he asserts that it was prejudicial error for the prosecution to question defendant as to why he did not subpoena a witness for trial. Fourth, defendant contends it was prejudicial error to allow bank records into evidence that were not a basis for the charges against defendant. Finally, defendant urges that it was error to allow defense counsel to represent defendant at the preliminary hearing where he had admitted he had a conflict of interest. In response, the State contends that defendant failed to preserve the first four issues for appeal and argues that the final issue is meritless because defendant expressly waived the conflict.

We have reviewed the portions of the record pertaining to the assignments of error and agree that four of the issues have not been properly preserved for appeal. First, the record reflects no objection to the prosecutor's comments in closing argument. Absent an objection, we are precluded from reaching the merits of the issue on appeal. See State v. Hales, 652 P.2d 1290, 1292 (Utah 1982). As to the second assignment of

error, the record contains no objection to the voir dire examination of witness Dorie Stewart. Third, although we agree it is inappropriate during cross examination for the prosecution to make any suggestion that defendant has a burden to establish a defense, the record also contains no objection to the prosecution's questions concerning defendant's failure to secure corroborative testimony. The foregoing issues were not properly preserved in the trial court and may not be considered for the first time on appeal.

Defendant's fourth contention is somewhat more complicated. The charges against defendant were based upon the six checks previously set out in this decision. At trial, the prosecution examined the custodian of the records pertaining to defendant's checking account. The witnesses' testimony covered all transactions on the account during its existence. At the beginning of the testimony, defendant's counsel made a general objection "to the relevancy of the bank records other than those records that particularly pertain to the exhibit that the state has entered." The trial court clarified the nature of the objection with counsel by inquiring if counsel was objecting to the admission of "other checks other than the ones that we're prosecuting." Defense counsel agreed that this was the objection he intended to make. The court overruled the objection "at this time," indicating "I haven't heard anything objectionable, but you'll have to redo your objection if something comes up that is objectionable." Defense counsel acquiesced in this procedure. The prosecution submitted photocopies of fifteen checks, in addition to the six checks that are the basis of the charge. Defense counsel objected to the use of photocopies of the checks, which was resolved, but made no other objection to the admission of the checks. We conclude that the issue has not been preserved for consideration on appeal.

Defendant's final claim is that the jury verdict should be overturned because counsel who represented defendant at the preliminary hearing had a conflict. We note that the preliminary hearing transcript was not transmitted to this court by the trial court as a portion of the official record. Instead, the first eleven pages of a document entitled Transcript of Preliminary Hearing was submitted as an addendum to defendant's brief and, as such, is not a part of the official record before this court. We further note, however, that both defendant and the State have relied upon this addendum, and on that basis, neither may challenge its validity as an accurate depiction of the proceedings. At the time of the preliminary hearing, defense counsel, Glen Cella, indicated

that, based on a police report he had not seen prior to that day, he determined that he had a conflict in representing defendant. The report reflected that charges had been investigated by Kaysville City Police, and defense counsel had served as a prosecutor for Kaysville in the past. After consultation, however, defendant determined that he would waive the conflict for purposes of the preliminary hearing only. The trial court examined defendant about his waiver and ruled that the hearing could continue. Substitute defense counsel represented defendant at the trial. (At the commencement of the trial, defendant made a motion to disqualify substitute counsel, which was denied.) Defendant now renews his original objection to Cella's representation at the preliminary hearing, attacking his own waiver of the conflict on the basis that he should not have been put to the choice of waiving the conflict or waiting in jail for substitute counsel's appointment. A defendant generally may not premise a claim of error on a ruling that he himself both assented to and sought. See, e.g., State v. Parsons, 119 Utah Adv. Rep. 19, 25 (Utah 1989) (A defendant may not allege on appeal prejudicial error which was affirmatively, knowingly, and intentionally waived); State v. Tillman, 750 P.2d 546, 560-61 (Utah 1987) (Invited error is procedurally unjustified and viewed with disfavor, especially where ample opportunity has been afforded to avoid such a result). We hold that defendant has waived the apparent conflict of interest and may not premise error on that basis.

For the foregoing reasons, the conviction appealed from is affirmed.

ALL CONCUR:

Gregory K. Orme, Judge

Regnal W. Garff, Judge

Richard C. Davidson, Judge

CERTIFICATION OF SERVICE

I hereby certify that I caused to be served four true and correct copys of the foregoing Writ of Certiorari upon the Utah Attorney General by deposit postage pre-paid with the U.S. Mail.

Dated this 16th day of January 1990

Thomas R. Humphries